

# EXHIBIT F



Proskauer Rose LLP Eleven Times Square New York, NY 10036-8299

October 11, 2018

## BY EMAIL

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Re: Non-Party Club Discovery in *Alterra Am. Ins. Co. v. National Football League, et al.*,  
No. 652813/2012 and *Discover Prop. & Cas. Co. v. National Football League, et al.*, No.  
65933/2012

Dear Mark:

We write on behalf of the 32 Non-Party NFL Member Clubs (the “Non-Party Clubs”) in response to your letter dated September 24, 2018 (the “Letter”) which sets forth the contentions of defendants (referred to herein as the “Insurers”) in the above-captioned matters (the “Action”) regarding purported deficiencies in the Non-Party Clubs’ responses and objections (the “Objections”) to the requests contained in the 32 individual subpoenas (the “Subpoenas”) served to the 32 Non-Party Clubs (the “Requests”).

The Letter is inherently contradictory in that it purports to begin a substantive meet and confer process to avoid motion practice with respect to Non-Party Clubs’ written Objections which were provided to Insurers nearly a year ago, yet does not offer to compromise or narrow the scope of Insurers’ incredibly broad demands in any way.<sup>1</sup> Insurers’ continued insistence on full compliance with all of their Requests as stated clearly is not a genuine attempt to meet and confer and fails to satisfy that requirement.

Any suggestion that Non-Party Clubs have been dilatory in not having already made document productions in response to your Requests is unfounded. Insurers served their first Non-Party Club Subpoenas in August 2017 and took nearly a year to properly serve all final subpoenas. Throughout that process, the Non-Party Clubs were fully cooperative with Insurers’ efforts to serve the subpoenas and promptly notified you when multiple Non-Party Clubs were served under non-existent or incorrect entity names, so that such mistakes could be corrected and the proper entities served. During that time, we conferred on a couple of occasions, including on

<sup>1</sup> See, e.g., Letter at 2 (“[T]he Insurers do not waive, withdraw or in any way modify their Requests. Nor do they agree that the [Non-Party Clubs] are not obligated to respond fully to all of the Requests”); *id.* (“The Insurers repeat that all of their Requests are important to the claims and defenses at issue in the underlying litigation and continue to request that each and every Request be fully complied with.”); *id.* at 4 (“For clarity, the Insurers expect that the Member Clubs’ search for documents responsive to [the priority Requests], and ultimately all of the Requests[.]”).

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January 18, 2018 and again on March 9, 2018. Those conversations centered on procedural issues and your request that the Non-Party Clubs produce *some* limited scope of documents, without addressing the merits of the Objections. No agreement concerning the scope of production was proposed or discussed during any of those conversations. The Letter is the first communication by Insurers purporting to address Non-Party Club's Objections.

During our discussion on March 9, 2018, you said you would send us a prioritized list of topics to facilitate discussions concerning the scope of the search Insurers are requesting the Non-Party Clubs undertake. In exchange, we agreed to provide you with draft language for a supplemental protective order to protect the 32 Non-Party Clubs. That did not happen and you are now trying to walk that agreement back. This is disappointing. Instead the Letter insists upon full production without narrowing Insurers' Requests in any respect.

Nonetheless, we continue to welcome productive discussions between Insurers and the Non-Party Clubs toward agreement to narrow the scope of production of documents by the Non-Party Clubs and avoid motion practice. To that end, we respond to some of the positions taken in your Letter as follows:

- It is important to note that the 32 Non-Member Clubs reside in 22 different states, each with their own discovery rules and laws that are individually applicable to the Subpoenas. The manner in which certain states view non-party discovery varies widely and the Non-Party Clubs intend to take full advantage of those laws in the event they are subject to motion practice. Notably, certain states are much more favorable to non-parties seeking their fees and costs in connection with responding to non-party discovery requests, and the Non-Party Clubs residing in those states will avail themselves of those laws.
- We take issue with your characterization of the Non-Party Clubs' efforts to move towards producing documents in response to the Subpoenas. We have been working closely with all 32 Non-Party Clubs over the past year to understand, primarily, which documents responsive to the Subpoenas are in their possession, custody or control, where those documents are located, which custodians are most likely to have responsive documents, whether certain documents even exist at the club-level and the types of documents that would be responsive. The answers to these questions differ on a club-by-club basis and the Non-Party Clubs have undertaken their own individual efforts to retain, collect and provide us with responsive information. Consistent with our discussions with you over the past year, we were preparing our clients to be able to move quickly to search for and produce responsive documents once an agreement with the Insurers was in place. To be clear, no agreement to produce responsive documents was ever proposed or reached.
- As stated in the Objections, the Non-Party Clubs will produce their current document retention policies (to the extent they exist) in response to Document Request No. 36. We were hoping that these documents could be produced with a larger production, but since

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no agreement as to the scope of that production has been reached, we will produce those documents promptly.

- We reject your proposal that the 32 Non-Party Clubs first search the files for your identified “priority” requests while agreeing to allow you to supplement those requests up to and including the entirety of the Subpoenas without limitation. The Non-Party Clubs intend to undertake a reasonable search for responsive documents one time (with supplementation as necessary) and an agreement as to scope is required before that process may begin.
- Similarly, we reject your proposed search terms for “initial collection efforts.” We must agree to a definitive list of search terms, with an agreement to supplement or change only if a term is deemed to be too under- or over-inclusive based upon search results, before any electronic searches are undertaken. We also request that you provide a list of search terms agreed to in party-discovery, or, if no agreement has been reached, whether certain terms are currently being litigated.
- None of the Non-Party Clubs, nor its counsel, have stated that the Requests are unduly burdensome because their counsel represents all 32 Non-Party Clubs. The Non-Party Clubs maintain that certain of the Requests, when read in connection with the Definitions and Instructions, are unduly burdensome with respect to the scope and time period sought when individually applied to each Non-Party Club.
- We agree that any production of documents will be done electronically and addressed to counsel and thus, the Non-Party Clubs will not withhold any documents on the basis that the subpoenas seek documents to be produced in a foreign jurisdiction.
- Without an agreement as to scope, we cannot determine whether your request for a document-by-document privilege log is appropriate. However, we note that categorical privilege logs are now preferred in many jurisdictions, including New York (*see* 22 N.Y.C.R.R. § 202.70(g)).
- As discussed above, at our meet and confer held on March 9, 2018, we told you that the Non-Party Clubs require an addendum to the protective order that protects the documents produced vis-à-vis the other Non-Party Clubs. We have drafted that language and will provide it to you promptly.
- The Non-Party Clubs stand by their objections to the temporal scope applicable to the Requests, however, we agree to meet and confer on this issue. We are particularly interested in why the Insurers believe that documents in the Non-Party Clubs’ possession from after the time that certain lawsuits involving the plaintiff in this matter (the “NFL”) were filed are relevant to any of the claims or defenses in the above-captioned matters. In connection with helping us understand your requested date parameters, please inform

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us as to whether any agreements or rulings have been made with respect to the date parameters for party-discovery and whether any such issues are currently being litigated.

- The Non-Party Clubs do not intend to withhold any documents retrieved and reviewed that are otherwise relevant on the ground that the Subpoenas seek identical documents from each of the Non-Party Clubs.
- The majority of your concerns relating to the Non-Party Clubs' Objections to the Subpoenas' Definitions (Letter at 6-7) can be remedied by an agreement on scope, search terms and custodians and thus are not addressed individually herein. We remain willing to meet and confer on each of those issues. For clarity, the Non-Party Clubs agree that they will not withhold documents retrieved and reviewed that are otherwise responsive on the basis of their Objections to the Definitions in the Subpoenas.
- The Non-Party Clubs maintain that Instruction No. 3 is premature and unduly burdensome because the Non-Party Clubs have objected to all of the Requests and no agreement has been made to produce any documents.
- The Insurers appear to have misinterpreted the Non-Party Clubs' specific objections relating to documents that would likely be found in the NFL's possession and relevance. (See Letter at 7-9.)

First, the Non-Party Clubs have never indicated that they believe that documents uniquely in the Non-Party Clubs' possession could be found in the NFL's possession, as they would not. Nor have the Non-Party Clubs indicated that they intend to withhold documents retrieved and reviewed on the basis that the documents could be in the NFL's possession. Rather, the Non-Party Club's specifically objected to Request Nos. 1-2, 4-23, 26-35 and 37+ (where applicable) to the extent those Requests seek "information in the possession of the Non-Party Club, but *not* in the possession of the NFL, because such information is not reasonably related to claims or defenses asserted in this Action." (emphasis added.) That is, it is the Non-Party Clubs' position that documents responsive to those Requests that were not transmitted or communicated to the NFL are not relevant to the Action and should not be produced. Request Nos. 3, 24 and 25, on the other hand, are already limited to documents and communications between the Non-Party Clubs and the NFL. (See, Request Nos. 3, 24 and 25 (each seeking "[a]ll Documents and Communications between the [Non-Party Club] and the NFL . . .").) Thus, productions made in response to each of the Requests (with the exception of Request No. 36, which seeks the Non-Party Clubs' document retention policies), should be limited to documents transmitted or communicated to the NFL.

This position is supported by your own articulation of relevance, which is limited to documents in the Non-Party Clubs' possession that were in the possession of the NFL, whether or not the NFL "retained or currently possesses" that information. (Letter at 8.) The example of relevant documents your Letter provides is that "a Member Club *may*

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*have in the past conducted research which was transmitted to the NFL and had communications with the NFL regarding these documents[.]” (Id. (emphasis added).) It appears, from your own articulation of relevance, that the Insurers are seeking discovery from each of the 32 Non-Party Clubs solely to confirm the accuracy of the productions they have or will receive from the NFL. The Non-Party Clubs believe that a search for such hypothetical transmittals and communications should first be exhausted through party-discovery and is precisely the type of fishing expedition that courts regularly reject.*

In the alternative, if such a fishing expedition is warranted, and absent your ability to articulate an additional category of relevant documents, the Non-Party Clubs believe that any documents retrieved and reviewed should be limited to documents that were transmitted or communicated to the NFL. Such a search could be accomplished by applying certain limiting search terms over custodians who were in contact with the NFL. Applying such parameters according to your own articulation of relevance would eliminate many categories of your Requests which, by their nature, consist entirely of documents that would not have been transmitted or communicated to the NFL. We remain willing to meet and confer on these issues.

- The Non-Party Clubs maintain their Objections relating to HIPAA, ADA and various state privacy laws. Further to the above, the Non-Party Clubs do not believe that private, personal medical information maintained by a Non-Party Club would in any way relate to the claims or defenses in this Action unless such information is otherwise relevant and was shared with the NFL. Indeed, courts recognize that sensitive non-party information, such as personal medical information, should not be produced, even pursuant to a protective order, absent a compelling showing of relevance. We do not believe the Insurers will be able to meet that standard. We remain willing to meet and confer on this issue.
- With respect to Request No. 13, seeking “[a]ll Documents and Communications relating to any workers compensation claim for Alleged Brain Injury filed by any current or former player of the [Non-Party Club],” please explain, as you state, how “data on bodily injury to each player . . . is relevant to various claims and defenses at issue in the litigation” even if that information was not in the possession of the NFL (*see* Letter at 10). We remain willing to meet and confer on this issue including regarding whether workers compensation files are the appropriate documents in which to provide the Insurers information on Alleged Brain Injuries to current and former players.
- With respect to Request No. 29, the Non-Party Clubs maintain their specific objections. Further, it is our understanding that searching for “[a]ll Documents and Communications related to any indemnity agreements between the [Non-Party Clubs] and the NFL” is unreasonable because it would exclusively return documents that have nothing to do with an indemnification that concerns to the underlying litigation because there is none. We remain willing to meet and confer on this issue.

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- Finally, the remainder of your concerns relating to the Non-Party Clubs' Objections to specific requests (Letter at 9-12), and requests to particular Non-Party Clubs (Letter at 12-16) have either already been addressed or can be remedied by an agreement on reasonable scope, search terms, custodians and time periods and, thus, are not addressed individually herein. We remain willing to meet and confer on each of those issues.

In addition, we request that you identify any issues in your Letter that have been agreed to or decided, or will be decided, by the Court or Special Discovery Master in party-discovery for our consideration.

We are available on the following dates to meet and confer in good faith: October 18, 22 and 23. Please suggest some times on those dates. In the meantime, the Non-Party Clubs reserve all of the rights, objections, claims and defenses. Thank you.

Sincerely,

*/s/ John E. Failla*

John E. Failla

*/s/ Seth Schafler*

Seth Schafler